87-1831

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM

No.

COOK COUNTY COLLEGE TEACHERS UNION LOCAL 1600, AFT, AFL-CIO,

Petitioner

vs.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT #508,

Defendant-Respondent

and

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,

Plaintiffs-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GILBERT FELDMAN, ESQ.
CORNFIELD AND FELDMAN
343 South Dearborn Street
Thirteenth Floor
Chicago, Illinois 60604
(1-312) 922-2800

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Whether it is violative of Section 4(a)(1) of the ADEA to offer early retirement incentives to all employees who elect to retire between the ages of 60-64, while not extending such benefits to those employees who elect to retire at age 65 or older?

2. If the answer to the first question is yes, whether it is a defense under Section 4(f)(2) of the ADEA for such early retirement incentives to have been based upon salary cost savings rather than actuarially determined benefit cost savings?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. While a petition for rehearing en banc was pending, motions to participate as amicus curiae were filed by Illinois Association for School Boards, Ed-Red and the Illinois Public Employer Labor Relations Association (Appendix 3) and Oakton Community College District No. 535 (Appendix 4). The motions were denied.

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IN THE

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Plaintiffs-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, COOK COUNTY COLLEGE TEACHERS UNION LOCAL 1600, AFT, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in Appendix 1. The opinion of the District Court also is unreported and is reproduced in Appendix 2.

JURISDICTION

The judgment of the court below was entered on January 12, 1988. A petition for rehearing en banc was denied on March 25, 1988. A motion for stay of mandate was granted by order dated April 7, 1988, to and including May 6, 1988, provided that if, during that time, the Clerk of the Supreme Court files a notice with the Clerk of the Court of Appeals that the Petitioner has filed the petition for a writ of certiorari, the stay of the mandate shall continue until final disposition of the case by the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2, 29 U.S.C. §621, provides that:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deteriora-

> tion of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Section 4(a)(1), 29 U.S.C. §623(a)(1), provides that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age; . . ..

Section 4(f)(2), 29 U.S.C. §623(f)(2), provides in pertinent part that:

> It shall not be unlawful for an employer . . . or labor organization—
>
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . [protected by the Act] because of the age of such individual; . . ..

STATEMENT OF THE CASE

The City Colleges of Chicago and the Cook County College Teachers Union negotiated an early retirement program for faculty members. The program was effective January 1, 1983. Under its terms, faculty members between age 55 and the mandatory retirement age of 70 have the option of taking early retirement. Faculty members opting to retire between the ages of 60 and 64 receive additional benefits in the form of unused accumulated sick pay and premium payments for group insurance coverage.

Three faculty members between ages 65 and 69 brought suit, claiming that the requirement that they retire between ages 60 and 64 in order to obtain the foregoing incentive benefits was violative of the Age Discrimination in Employment Act. (29 U.S.C.A. Sec. 626.)

Cross motions for summary judgment were filed. The District Court entered summary judgment for the City Colleges and the Union. No finding was made with respect to whether there was age-based discrimination in violation of Section 4(a)(1) of the AOEA. The District Judge based his ruling upon a finding that the program qualified under the Section 4(f)(2) exception. The District Court found that it was uncontested that the program was designed to provide an incentive for early retirement in order to save high salary costs. It further found that there were substantial savings which increased significantly the earlier the faculty member retired.

The Court of Appeals for the Seventh District reversed. The Court found that the age-based incentive was a fringe benefit and therefore violative of Section 4(a)(1). It further found that an issue existed with regard to whether the incentive benefit was a subterfuge to evade the purposes of the Act, thereby raising an issue under Section 4(f)(2).

JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the District Court was based upon 29 U.S.C.A. Sec. 626(b) and 28 U.S.C.A. Sec. 1337.

REASONS FOR GRANTING THE WRIT.

I. The decision below conflicts with decisions of the Second, Fourth and Eighth Circuits.

The decision below conflicts with decisions of other circuits in different ways with regard to both Sections 4(a)(1) and 4(f)(2).

SECTION 4(A)(1)

The Seventh Circuit decided the 4(a)(1) issue by equating the age-based voluntary retirement incentive at issue with an age-based fringe benefit.[1]

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[1] "In the present case, however, there is discrimination against the older worker. Everyone between 55 and 69 is eligible for early retirement, but those between 64 and 69—an older age group—are disfavored relative to the younger employees in the eligible group. If the City Colleges said to their faculty, at age 65 you lose your free parking space (or dental insurance, or any other fringe benefit), they would be guilty, prima facie, of age discrimination. Early-retirement benefits are another fringe benefit—and they plummet at age 65."

The Seventh Circuit distinguishes between the instant case, in which the window period is based upon age, and a situation in which the window period is open only during a specified time period. In *Henn* v. *National Geographic Society*, 819 F.2d 824 (7th Cir. 1987), the Seventh Circuit validated an incentive option for early retirement open for two months. The Court rejected a contention that this limited option, which restricted the age during which it could be exercised, was discriminatory. The analysis of the Court was predicated upon the fact that the

The Fourth Circuit, in *Britt* v. *DuPont Company,* 768 F.2d 593 (4th Cir. 1985), disagreed, distinguishing between a unilaterally imposed age-based fringe benefit and an age-based offer that gives the employee the option of accepting or rejecting a proposal.[2] After deciding this threshhold question, the Court, stating that it was unnecessary to reach the Section 4(f)(2) defense issue, decided the merits of the age-based discrimination claim under Section 4(a)(1).

The Eighth Circuit, in *Patterson* v. *Independent School District #709,* 742 F.2d 465 (8th Cir. 1984), decided that an age-based voluntary retirement incentive is not in violation of the ADEA. However, the Court addressed the problem under the Section 4(f)(2) exception for bona fide retirement plans rather than under the Section 4(a)(1) anti-

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plaintiffs had not been disadvantaged by the granting of the option and they, therefore, lacked standing to raise a discrimination claim under Section 4(a)(1).

[2] "When an employer gives severance pay or related benefits to employees as part of a plant closing, no relationship exists between the value of the job given up and the value of the benefit. Severance pay in that context is an arbitrarily determined amount that can be thought of as a fringe benefit rather than compensation for not working. In contrast, DuPont's severance pay offer was designed exclusively to induce employees legally entitled to continue to work to forego that entitlement. The payments here therefrom represented compensation for giving up the right to earn wages. As such, they are properly viewed as a wage substitute, not as a fringe benefit." 768 F.2d at 595.

Stated otherwise, if you lose your parking space or insurance at age 65, then working conditions of older employees are adversely affected. However, the same is not true when the employee is provided a free choice between options and the employee's decision is to be made prior to age 65.

discrimination clause.[3] In support of its decision, the Court cited with approval *Mason* v. *Lister,* 562 F.2d 343, 346-347 (5th Cir. 1978), in which "it was emphasized that a voluntary plan did not give the employer power to 'forcibly retire older workers' and hence did not 'conflict with the Congressional goal' of promoting employment of older persons 'based on their ability rather than age.' "

The Second Circuit has held that in the absence of a contention to the contrary, an age-based voluntary retirement incentive violates Section 4(a)(1). *Cipriano* v. *Board of Education of the City School District of North Tonawanda,* 785 F.2d 51, 53 (2d Dist. 1986). In accord: *Paolillo* v. *Dresser Industries,* 813 F.2d 583 (2d Cir. 1987).

To summarize, the Seventh and Second Circuits hold that an age-based voluntary retirement incentive presumptively violates the ADEA, while the Fourth and Eighth Circuits disagree.

SECTION 4(F)(2)

Both the Seventh Circuit and the Second Circuit have dealt with the standard to be applied in adjudicating the Section 4(f)(2) affirmative defense, which these Circuits

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[3] *Patterson* entailed a scale of early retirement benefits sliding downward with advancing age. The Eighth Circuit reasoned that since (1) This Court, in *United Airlines* v. *McMann,* 434 U.S. 192 (1977), had upheld an involuntary early retirement plan, and (2) Congress, in the 1978 amendment to Section 4(f)(2), had provided that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual . . ." it logically followed that "a voluntary plan is *a fortiori* permissible."

The Court did not discuss the "subterfuge" element of Section 4(f)(2).

have found to govern these cases. In each decided case the Courts have found that the plan was bona fide and the controlling issue was whether the incentive was a subterfuge to evade the purposes of the Act.

The Second Circuit, in *Cipriano* and in *Paolillo,* has held that the employer, to demonstrate lack of subterfuge, has the burden of showing: (1) that the decision to retire early is truly voluntary, and (2) a "legitimate business reason for structuring the plan as it did." 785 F.2d at 58.

In holding that the incentive plan was "a *bona fide* employee benefit plan," the *Cipriano* court rejected plaintiffs' argument that Section 4(f)(2) applies only to plans in which the age-based reduction of benefits is justified by actuarially significant cost factors. The court read the applicable administrative interpretation, 29 C.F.R. §860.120(a)(1) [recently redesignated as 29 C.F.R. §1625.10(a)(1)], to include within Section 4(f)(2) plans that reduce benefits on the basis of age due to "significant cost considerations," whether or not those considerations are actuarially based. 785 F.2d at 54. The court stated that "significant cost considerations" are involved in designing early retirement incentives, because the goal of these plans is to save salary expenses; since the departure of younger workers saves more years of salary, the court observed, "it is only reasonable for the employer to offer more" to them than to older workers who remained on salary longer. 785 F.2d at 55. Finally, in the court's view, the structure of the plan—*e.g.,* whether it offered a lump sum benefit before age 60 or one that tapered off by 60—goes to whether it is a subterfuge and not to "whether it qualifies generically for the shelter of §4(f)(2)." 785 F.2d 55.

Turning to the question of whether the plan was "a subterfuge to evade the purposes" of the Act, the court expressed uncertainty as to the nature of the proof that

Section 4(f)(2) requires in this context. It pointed out that the "subterfuge" proviso had been litigated mainly in cases involving mandatory retirement. 785 F.2d at 58. Accordingly, the court thought it "rather hard to give content to the concept of 'subterfuge' when that term is applied to a plan for voluntary action . . . and the complaint is made, not by employees who claim that they were tricked . . . into prematurely leaving the workforce, but rather by employees who protest at having been excluded from the option." 785 F.2d at 58. But the court reasoned that, since Congress (in its 1978 ADEA amendments banning involuntary retirement because of age) had left the "subterfuge" language in the statute, employers were required to show *something* more than simply that challenged benefit plans are bona fide. For this reason (and in light of the Department of Labor's Section 4(f)(2) interpretation (29 C.F.R. §860.120(a)(1), now 29 C.F.R. §1625.10(a)(1)), requiring employers to justify age-based benefit distinctions on the basis of age-related cost considerations), the court held that at minimum the defendants "must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as [they] did." 785 F.2d at 58.

The court suggested, however, that the "evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan." 785 F.2d 59.

The Eighth Circuit in *Patterson,* without mentioning the subterfuge issue, held that an early retirement incentive involving a downward sliding scale was protected under Section 4(f)(2).

But the Seventh Circuit has adopted a far different view. In the decision below, the Court reasoned that the business-

reason defense related, not to the salary savings which the employer sought to achieve, but rather to the cost of the incentive benefit itself. According to the Court, the objective of encouraging voluntary retirement to save salary costs is evidence of subterfuge.[4]

To summarize, the decision of the Seventh Circuit with regard to Section 4(f)(2) is in conflict for varying reasons with decisions of the Second and Eighth Circuits. Also, as earlier noted, the Fourth Circuit never reaches Section 4(f)(2), disposing of the issue under Section 4(a)(1).

II. The public importance of the issues presented.

Early retirement incentive plans recently have been proliferating in both the public and private sectors. (See "Offering of Early Retirement Incentives on Rise at Top Industrials," in Daily Labor Report (BNA), July 15, 1987, A-12, summarizing The Wyatt Company, "Top 50: A Sur-

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[4] "We do not interpret *Metz* v. *Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987) to forbid employers to take into account a higher cost for an older employee that may be due to the higher life-insurance premiums for insuring the lives of older people. But where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of Section 4(f)(2) . . . Otherwise the inference of age discrimination will be strong. . . .

As far as the record discloses, the Colleges could achieve all of the lawful objectives of their Early Retirement Program by tying the sick pay distribution to salary and years of service and the insurance coverage to the actual difference in premium costs that is due to the age of the employee. If so, this is further evidence that the actual Program is a subterfuge, designed to get rid of faculty members when they reach 65."

vey of Retirement, Thrift and Profit-Sharing Plans Covering Salaried Employees of 50 Large U.S. Industrial Companies as of January 1, 1987." Also see Appendices 3 & 4.

It is a common feature of these plans to provide an economic incentive to employees who opt to retire prior to a cut-off age. (See Appendix 3 at para. 4; Appendix 4 at para. 2.)

These plans are so structured to reflect the general interests that lead to the bargain. The employer benefits because the older employees who elect to retire are at the top of the salary schedule. The salary savings to the employer greatly outweigh the cost of the incentive benefit. For each additional year of early retirement, the savings to the employer increase. At the same time, the older employees desirous of early retirement receive a "sweetener" to finance their early retirement. The older employees who desire to continue working are not adversely affected.

The ADEA's purposes are to prevent arbitrary age discrimination and to promote the employment of older workers based on their ability rather then age. See Section 2(b), 29 U.S.C. Sec. 621 (b). The early retirement incentive here at issue furthers rather than impairs those objectives. Yet the Seventh Circuit has virtually rendered it illegal while the Second Circuit has subjected it to an as yet not clearly defined "subterfuge" test. Under the current uncertain status of the federal law, there obviously is no incentive for employers to offer such early retirement incentives. Older employees desiring to opt for early retirement will be penalized without a commensurate benefit to anyone. The intervention of this Court to clarify the law is urgently required.

In our view, the present status of the law is confused and off-track because lawyers in the early cases failed to argue and the federal courts failed to analyze the relationship

between Section 4(a)(1) and 4(f)(2) in the context of these early retirement incentives. A clear analysis demonstrates that the cases should be decided under Section 4(a)(1) and not under Section 4(f)(2); Section 4(f)(2) was never intended to deal with such situations and does not provide a meaningful formula for the adjudication of the issue. We briefly discuss these two provisions below.

Section 4(a)(1).

Section 4(a)(1) applies when an employer acts so as to "discriminate *against* any individual . . . because of such individual's age; . . ."(Emphasis added). That means that the person must be *disadvantaged,* not just treated differently because of an age-based act.

It is only recently that the word *discriminate* came to embody disadvantage within its primary meaning. The obvious reason is the advent of anti-discrimination laws. The Oxford English Dictionary (1961) provided the following definitions of the word *discriminate:*

> 1. To make or constitute a difference in or between; to distinguish, differentiate.
>
> 3b. *To discriminate against:* to make an adverse distinction with regard to; to distinguish unfavorably from others.

The Random House Dictionary (2d Ed. 1987) provided the following definitions:

> 1. To make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs rather than according to actual merit; show partiality: *The new law discriminates against foreigners in favor of his relatives.*

2. To note or observe a difference; distinguish accurately; *to discriminate between things.*

The Plaintiffs in the instant case were not disadvantaged because of the early retirement incentive plan. As was stated in *Henn* v. *National Geographic Society,* 819 F.2d 824, 826 (7th Cir. 1987): "When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial . . ."

The significance of the difference between the two meanings of the word *discriminate* was early demonstrated by this Court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), when reversing *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). The earlier case had held that separate but equal, although a discrimination—between was not a discrimination—against. The latter case disagreed, finding that Blacks were inherently disadvantaged by their separate treatment. But while distinctions as to race, sex, religion, or national origin are inherently discriminatory (in the sense of conferring disadvantage), that is not necessarily true in the case of a voluntary benefit based on age. For in the former instances, to distinguish between is to discriminate against. Age is different because of the unique attributes of the human aging process, which eventually places *all* employees within the window period of eligibility for early retirement incentives.[5]

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[5] The courts have recognized that "[t]he progression of age is a universal human process," which thus tends to distinguish age discrimination cases from "cases involving the immutable characteristics of race, sex and national origin." *Laugesen* v. *Anaconda Co.,* 510 F.2d 307, 313, n.4 (6th Cir. 1975). *Accord, e.g.: Holley* v. *Sanyo Mfg., Inc.,* 771 F.2d 1161, 1166 (8th Cir. 1985); *Dorsch* v. *L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986); Dabrowski* v. *Warner-Lambert Co.,* 815 F.2d 1076, 1079 (6th Cir. 1987).

Section 4(f)(2).

Section 4(f)(2) is never reached unless a violation of Section 4(a)(1) is first established. An examination of the history and purpose of Section 4(f)(2) discloses that it was never intended to apply to age-based employee options. Its intended scope was limited to items such as fringe benefits with regard to which an employee was not allowed a free choice.

The undisputed sole purpose of Section 4(f)(2) was to eliminate the penalty imposed upon employers hiring older workers when the cost of providing benefits to older workers was higher then to other employees. (See 124 Cong. Rec. (Javitz); 124 Cong Rec. (Hawkins); *E.E.O.C.* v. *Borden's, Inc.*, 724 F.2d 1390, 1395-1396 (9th Cir. 1984)). Congress indicated that the Secretary of Labor would issue comprehensive guidelines for the operation of Section 4(f)(2) to achieve this objective. (See 124 Cong. Rec. 8219 (Javitz).) New regulations were adopted. They deal with the manner in which it is to be ascertained whether a lower level of benefits for older employees is justified by age-related cost considerations, rather than being a subterfuge to evade the purposes of the Act. See 29 C.F.R. Sec. 1625.10. They provide that "Neither Section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. (29 C.F.R. §1625.9(f))

Neither the 4(f)(2) exception clause nor these regulations have anything to do with voluntary early retirement incentives whose cost justification is based, not on the cost of the benefit, but on the salary savings. Aside from Section 1625.9(f), the Secretary's Interpretive Bulletin does not even mention early retirement incentive plans, let alone

address the issue of whether the "equal cost" concept should apply to them.[6]

Given the foregoing history of Section 4(f)(2), coupled with the fact that there is no conflict between a voluntary age-based retirement incentive and the purposes of the Act as stated in Section 2(b), it is plainly arbitrary if not irrational to apply the "subterfuge" test in Section 4(f)(2) to such an incentive.[7] For unlike the situation where a benefit differential is sought to be justified on the ground of direct cost disparities, there is no logical "inference of unlawful discrimination" when the employee is given a free choice between valuable options. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

It is, therefore, obvious why the Second Circuit is encountering difficulty in applying the "subterfuge" concept to age-based retirement incentives while the Seventh Circuit is applying it in a manner that is incapable of rational justification. The intervention of this Court is required to resolve this conflict, which has such far-reaching adverse consequences in the application of the ADEA.

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[6] The subject of early retirement incentives was not discussed in the extensive preambles to the IB, either as initially proposed or as promulgated in final. 43 Fed. Reg. 4326 4-68 (1978); 44 Fed. Reg. 30648-657 (1979). Likewise, the subject was not mentioned during administrative hearings or in written comments on the proposed IB. *See Official Report of Proceedings before the Office of Administrative Law Judges of the U.S. Dep't of Labor, In the matter of Age Discrimination in Employment Act of 1967* (1978), transcript of hearings (2 vols.) and written comments (4 vols.).

[7] The definition of the word *subterfuge* as used in Section 4(f)(2) war provided in *United Airlines* v. *McMann*, 434 U.S. 192, 203 (1977); "a scheme, plan, stratagem or artifice of evasion."

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CORNFIELD AND FELDMAN

Gilbert Feldman

APPENDIX

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1051

HARVEY KARLEN, ARNOLD KUHN,
and LORETTA CARSELLO,

Plaintiffs-Appellants,

v.

CITY COLLEGES OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 2925—**John F. Grady**, *Chief Judge.*

ARGUED NOVEMBER 6, 1987—DECIDED JANUARY 12, 1988

Before POSNER and COFFEY, *Circuit Judges*, and NOLAND, *Senior District Judge.**

POSNER, *Circuit Judge.* Three professors brought suit under the Age Discrimination in Employment Act, 29 U.S.C. § 626, complaining that the Early Retirement Program of the City Colleges of Chicago, adopted in 1982 as part of a collective bargaining agreement with a local

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* Hon. James E. Noland of the Southern District of Indiana, sitting by designation.

union of the American Federation of Teachers, discriminates against persons over 65. All three plaintiffs were between 65 and 69 when they brought the suit. Two had retired—one at 65, the other at 67. The third, who had been 64 when the Early Retirement Program was adopted, was still employed by the Colleges when the district judge granted summary judgment for the defendants and dismissed the case.

In 1980, two years before the Age Discrimination in Employment Act lifted the minimum mandatory retirement age for college and university teachers from 65 to 70, the Illinois legislature passed a statute making 70 the mandatory retirement age for employees in Illinois. At the time, the City Colleges had a mandatory retirement age of 65 for faculty members. The Colleges contended that the new statute did not apply to them, so they declined to comply with it, precipitating a suit that they lost when the Supreme Court of Illinois decided in 1981 that the statute did apply to them. Even before the decision the Colleges had been concerned with the high average age of the faculty members in many of their departments—the interaction of the tenure system with declining enrollments and budgets had resulted in there being few openings for new teachers—and had been trying to devise an early-retirement program. Four months after the supreme court's decision, the City Colleges began drafting the Early Retirement Program at issue in this case. In trying to "sell" the Program, the Chancellor of the City Colleges explained that its main purpose was "to realize financial savings by replacing older faculty members earning a higher salary with younger faculty members at the lower end of the salary schedule." Such replacement would not only save money but also promote the "infusion of new views, . . . because you couldn't force oldtimers to go out and get more courses in the more recent things in their own field." There was also talk of bringing in "new blood" (an expression that we suspect will soon disappear from the employers' lexicon as awareness of the menace of age discrimination litiga-

tion seeps through the employer community), and, as part of this process, of making room for women and members of minority groups; most tenured faculty members were white and male.

The Early Retirement Program is open to any faculty member between 55 and 69 years of age who has been continuously employed full-time for at least ten years. The size of the pension that a faculty member who takes early retirement is entitled to is a function of his highest four years' salary plus his years of service. About this aspect of the Program the plaintiffs have no complaint—for the excellent reason that the size of the pension is keyed not to age but, as we have said, to salary and length of service. The plaintiffs complain about two other features of the Program, which are keyed to age. The first relates to accumulated sick pay. A faculty member who is between the ages of 55 and 58 when he takes early retirement is entitled to receive, in addition to his pension, a lump sum equal to 50 percent of his accumulated sick pay, valued at his base salary rate in his final year of service. The percentage rises to 60 percent for 59-year-olds and 80 percent for 60- to 64-year-olds, then plunges to 45 percent for 65- to 70-year-olds. Retirement is mandatory at 70. Not until 1994 does the Age Discrimination in Employment Act eliminate mandatory retirement for academic employees. See Act of Oct. 31, 1986, Pub. L. 99-592, § 6(b) (repealing 29 U.S.C. § 631(d) as of Dec. 31, 1993).

The second feature of the Early Retirement Program of which the plaintiffs complain is that while faculty members who retire between the ages of 55 and 64 continue to be covered by the Colleges' group insurance policy (which includes life, health, dental, vision, homeowner's, and automobile insurance) until they reach the age of 70, those who retire at age 65 or later cease, upon retirement, to be covered. Although they can continue to buy this insurance at the rates in the Colleges' policy, they are out the premiums, which covered employees do not pay.

The combined effect of the two challenged features of the Early Retirement Program on these plaintiffs is substantial. One of the plaintiffs would have received an extra $23,857 in sick-pay distribution had he retired at 64; and a faculty member who retires at 65 rather than 64 has to pay $22,430 in insurance premiums to retain his coverage until 70. However, the *net* loss in retirement benefits is lower than the sum of these figures. The later one retires, the higher one's salary is apt to be in one's last four years of service and the greater one's length of service; hence one's pension will be higher. And—though this is a small factor—unused sick leave not credited to the lump-sum distribution is credited to years of service, which also pushes up one's pension. Moreover, the distribution of sick pay, though it represents a smaller percentage of his accumulated sick leave for the employee retiring later, is computed at the employee's last salary, which is likely to be higher the longer he stays.

But the relevance of these points is obscure. If an employer had no mandatory retirement age but took away employees' free parking spaces when they reached 65, this would be age discrimination even if, as a matter of fact, the total remuneration the next year of employees who didn't take the hint but kept on working rose by more than the value of the parking space that they had lost. And in any event a person who keeps working beyond his preferred retirement age in order to make up the dip in retirement benefits at age 65 is incurring a considerable opportunity cost, whether in leisure forgone or in a forgone opportunity to work for another employer at a salary that would be on top of the retirement benefits from his previous employment. Even if this factor is ignored, it is by no means clear—it is in fact unlikely—that the increment in pension from another year at work would make up for almost a $50,000 drop in retirement benefits. Certainly for purposes of evaluating a motion for summary judgment, the district judge was required to assume that a faculty member who decides not to retire at age 64 incurs a considerable penalty. How large the penalty is

would normally be a matter for determination at the damages stage of litigation.

The question of the proper treatment of early-retirement programs is the most difficult question under the Age Discrimination in Employment Act. The purpose of such programs often is to ease out older employees, whether because they cost the employer more in salary or fringe benefits, or have gone stale, or are blocking advancement for the ambitious young. Often, therefore, the discussions leading up to the adoption of such programs will generate evidence of age discrimination. Yet the discrimination seems to be in favor of rather than against older employees, by giving them an additional option and one prized by many older employees. Nor can it seriously be argued that the concept of early retirement for workers over a specified age stigmatizes such workers, as would a program designed to change not the age but the racial composition of the work force by allowing blacks but not whites to retire early. Entitlement to early retirement is a valued perquisite of age—an additional option available only to the older worker and only slightly tarnished by the knowledge that sometimes employers offer it because they want to ease out older workers. These considerations led us to hold recently that a worker who elects early retirement cannot turn around and sue his employer unless he can show that he was forced to take early retirement by an explicit or implicit threat to fire (or otherwise punish) him because of his age if he did not. *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987).

This case requires us to consider what at first glance may seem a completely different aspect of early retirement: the complaint not of the worker who elected early retirement but of the worker who, having declined it, believes he is being punished for his decision. Actually these two situations are the same. Whether a worker takes early retirement because he fears he will be discriminated against on account of his age if he does not, or refuses to take early retirement and indeed is then discriminated

against on account of his age, his rights under the Age Discrimination in Employment Act have been violated.

There is, however, a real and not merely formal difference between this case and *Henn*. In *Henn*, all employees over 55 were offered a severance bonus equal to a full-year's salary if they retired within two months after the offer was made. There was no discrimination within the group eligible for early retirement; the amount of an employee's early-retirement benefits was not keyed to his age. Of course, everyone in the eligible group who rejected the offer suffered in the sense that if he retired later on he would not get the bonus. But no one suffered because of his age except employees under 55, who were not eligible for the program (more about them shortly). A 56 year old who declined to retire was no better off than a 64 year old who declined to retire; both lost the same thing, a year's bonus. The offer was more attractive, it is true, the nearer one was to leaving; but ordinarily that would be the older worker. A person who plans to retire at 65, and at age 64 is offered a chance to retire with a full-year salary as severance pay, will leap at the chance. But an early retirement plan that treats you better the older you are is not suspect under the Age Discrimination in Employment Act. Compare *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-29 (7th Cir. 1986). Title VII protects whites and men as well as blacks and women, but the Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger *against* the older. The protected zone begins at age 40, but if on that account workers 40 or older but younger than the age of eligibility for early retirement could complain—workers 40 to 54 in *Henn*—early retirement plans would effectively be outlawed, and that was not the intent of the framers of the Age Discrimination in Employment Act. The *reductio ad absurdum* of the reasoning which views early retirement plans with suspicion would be to view permitting workers to retire when they reach the age of 65 as a form of discrimination against workers aged 40 to 64. Then the employer

could be confident of escaping liability under the Age Discrimination in Employment Act only by allowing retirement at age 40!

In the present case, however, there is discrimination against the older worker. Everyone between 55 and 69 is eligible for early retirement, but those between 64 and 69—an older age group—are disfavored relative to the younger employees in the eligible group. If the City Colleges said to their faculty, at age 65 you lose your free parking space (or dental insurance, or any other fringe benefit), they would be guilty, prima facie, of age discrimination. Early-retirement benefits are another fringe benefit—and they plummet at age 65.

There may be good reasons for them to plummet, but the reasons are relevant not to the prima facie case of discrimination but to the defense in section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2), for "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Age Discrimination in Employment Act]." The defense has two elements, and the defendants have the burden of production and of persuasion on both. See, e.g., *Cipriano v. Board of Education*, 785 F.2d 51, 57-59 (2d Cir. 1986) (Friendly, J.). They must show that the features of the Early Retirement Program of which the plaintiffs complain are (1) part of a bona fide employee benefit plan, and (2) not a subterfuge. Some cases, such as *EEOC v. Fox-Bayside School District*, 772 F.2d 1294, 1299 (7th Cir. 1985), and *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 223 (3d Cir. 1984), mention a third element—that the challenged action by the employer have been in conformity with the plan—and others, such as *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 and n. 3 (9th Cir. 1984), divide part (1) of the required showing into two pieces, plan and bona fide. But these refinements are obvious, and it is desirable to state rules as simply as possible and not make legal doctrine even more prolix and forbidding than it is.

The record compiled in the summary judgment proceeding is adequate to establish (1). The Early Retirement Program, to which the challenged features are integral, is part of the overall retirement plan—a genuine retirement plan—that the City Colleges negotiated with the teachers' union and embodied in their collective bargaining agreement. The hard question is whether the challenged features constitute a subterfuge, that is, are designed to discriminate against faculty members 65 or older.

Nothing in the Age Discrimination in Employment Act forbids an employer to vary employee benefits according to the cost to the employer; and if, because older workers cost more, the result of the employer's economizing efforts is disadvantageous to older workers, that is simply how the cookie crumbles. In *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1208-11 (7th Cir. 1987), this court carved an exception to this principle for the case where the older worker's higher cost is due solely to his having received pay increases based on seniority. We do not interpret *Metz* to forbid employers to take into account a higher cost for an older employee that may be due to the higher life-insurance premiums for insuring the lives of older people. But where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2). See 29 C.F.R. § 1625.10(a)(1), (d)(1)-(3) (EEOC regulation interpreting section 4(f)(2)). Otherwise the inference of age discrimination will be strong—certainly strong enough to defeat a motion for summary judgment by the party having the burden of persuasion, that is, the defendant. The City Colleges tried to prove that the age grading in the Early Retirement Program faithfully reflects the pattern of costs; we must decide whether they succeeded to the level required to deprive the plaintiffs of a trial.

Regarding the sick-leave benefit—which, remember, drops from 80 percent at age 64 to 45 percent at age

65—the Colleges make two arguments. The first is that sick leave not credited to the lump-sum distribution is credited to length of service and therefore goes to increase the pension component of the retirement benefits. The argument is fine in principle, but there are no figures in the record showing the trade-off between the lump-sum distribution of unused sick leave and the crediting of a fraction of that leave to years of service instead. The second argument is that the older a worker is, the more sick leave he will have accumulated and therefore the greater his distribution will be even if it is fixed at a lower percentage of his final base pay (which anyway will ordinarily be higher than that of a younger worker). This argument ignores two points. The first is that older workers may use more of their sick leave than younger ones, because health problems increase with age. The second and more important point is that sick-leave entitlement is a function of years of service—not age. The Colleges reply that age and length of service are highly correlated, but a document put in evidence by the plaintiffs belies this by showing large discrepancies between age and length of service. Moreover, if the purpose of grading the sick-leave distribution by age is to recognize the greater accumulation of unused sick leave by workers long on service, why don't the Colleges make the percentages vary with length of service, rather than use age as a crude proxy? And why the big drop at age 65? The record does not answer these questions.

Regarding the cut-off of insurance coverage at age 65, the Colleges are on solider ground in arguing that there is a correlation between age and cost. Insurance premiums are frequently tied to age, life insurance being only the most dramatic example. However, there is no evidence in the record concerning the Colleges' cost of insurance under its group policies except for life insurance—which indeed is about 50 percent higher for a 69-year-old faculty member than a 64-year-old one, but is only 8 percent higher for a 65 year old than for a 64 year old. And even if it were 50 percent higher for the 65 year old, that

would argue for cutting his coverage by 50 percent, not by 100 percent. It is doubtful that the premium costs of the other forms of insurance in the Colleges' package rise as rapidly with age, and some (e.g., homeowner's) may not rise at all. The cost of health insurance actually falls, because Medicare kicks in at age 65 and the coverage of the group policy is concomitantly reduced.

A feature common to both the sick-pay and insurance components of the Early Retirement Plan is the sharp drop in benefits at age 65. Against the background of the Colleges' resort to litigation in a futile effort to preserve for a couple of more years its mandatory retirement age of 65, an inference arises that the Colleges were doing everything they could to induce faculty members to retire by 65. The Colleges cannot and do not argue that the drop in benefits at age 65 is justified by the higher cost of benefits to a 65-year-old retiree as compared to a 64-year-old one (because of more accumulated sick leave, valued at a higher base pay, and because of higher insurance costs). They argue that in order to induce early retirement of faculty members in the 65-69 year bracket they have to make 65 a breaking point. They say that if the decline in benefits with age were gradual, as it would have to be to reflect accurately the changing cost of the retirement package, no one would retire before 70. The small annual decline in sick-pay distribution and in insurance coverage would be more than offset by the growth in the pension component of the retirement package as a result of salary raises and additional years of service. So the purpose of the Early Retirement Program—to induce early retirement—would be defeated.

This strikes us as a damaging admission rather than a powerful defense. To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed. Rather than offering a carrot to all workers 55 years and older, as in the *Henn* case, the City Colleges are offering the whole carrot to workers

55 to 64 and taking back half for workers 65 to 69. The reason is that the Colleges want to induce workers to retire by 65. In effect they have two early retirement programs; a munificent one for workers 55 to 64 and a chintzy one for workers 65 to 69. It may be that retirees in the second group cost the Colleges more than retirees in the first group, but the difference in cost seems much smaller than the difference in retirement benefits; indeed, there may be no net difference in cost.

As far as the record discloses, the Colleges could achieve all of the lawful objectives of their Early Retirement Program by tying the sick-pay distribution to salary and years of service and the insurance coverage to the actual difference in premium costs that is due to the age of the employee. If so, this is further evidence that the actual Program is a subterfuge, designed to get rid of faculty members when they reach 65.

We sympathize not only with the plight of the City Colleges in an era of declining enrollments and financial stringency, but also with the plight of young academics who cannot find decent teaching jobs because tenured faculty refuse to retire, and with the concerns of those who believe that the quality of American higher education is endangered by the prospect of faculty gerontocracies protected by the Age Discrimination in Employment Act. However, the colleges and universities lobbied hard with Congress against the raising of the minimum mandatory retirement age to 70 (and its elimination altogether, effective in 1994), and they are a powerful lobby. They lost, and they cannot be allowed by indirection to reinstitute what was for so long the age-65 mandatory retirement norm.

Whether that is what the City Colleges were trying to do here is a question that must abide the trial that the plaintiffs were erroneously denied. We hold only that the evidence submitted by the defendants in support of their motion for summary judgment does not establish that a

reasonable jury could not find that the Early Retirement Plan is a subterfuge and therefore violates the Age Discrimination in Employment Act.

REVERSED AND REMANDED.

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APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARVEY KARLEN, et al.,
Plaintiffs,
v.
CITY COLLEGES OF CHICAGO, et al.,
Defendants.
NO. 84 C 2925

MEMORANDUM OPINION

This age discrimination case is before us on the parties' cross-motions for summary judgment. Because we find that the defendants' early retirement program is an optional and bona fide employee benefit plan and not a subterfuge to evade the remedial purposes of the Age Discrimination in Employment Act, we grant summary judgment for defendants.

FACTS

Defendants City Colleges of Chicago, the Board of Trustees of Community College District #508 (the "Board"), and the Cook County Teachers Union Local 1600 (the "Union"), agreed to institute an early retirement program for City College faculty members. The program was adopted in October 1982, and went into effect on January 1, 1983. Under the terms of the program, faculty members between 55 and the mandatory retirement age of 70 are given the option to take early retirement. Two aspects of the program

are at issue in this case. The first is the insurance coverage provision in Paragraph C, which reads in part:

> The Board shall provide the retiree with the same individual insurance coverage available to faculty members under this Agreement, and shall make the same premium payments therefor, until age 70, provided that, after the age of 65, such insurance coverage(s) shall be reduced to the extent that Medicare or comparable benefits are otherwise available to the early retiree. However, if the faculty member retires after the age of 65, the City Colleges shall not be required to pay the premium for group insurance coverage, provided that such early retiree shall have the right to purchase such insurance through the City Colleges at the then prevailing cost of such coverage for full-time faculty members.

Plaintiffs' Motion for Summary Judgment, Exhibit B.

The other disputed feature of the program is Paragraph D, which establishes an age-based schedule of termination benefits for early retirees:

> At the time of retirement at age 55 or over, or upon total disability or death, a faculty member or his estate shall receive a lump-sum payment of the unused portion of his accumulated sick leave computed at his final base rate of pay according to the following schedule:

Age	Percent of Value of Accumulated Sick Leave	Age	Percent of Value of Accumulated Sick Leave
55	50%	63	80%
56	50%	64	80%
57	50%	65	45%
58	50%	66	45%
59	60%	67	45%
60	80%	68	45%
61	80%	69	45%
62	80%	70	45%

> A faculty member retiring at or after the end of the summer term of any calendar year shall be paid said lump-sum payment in the calendar year subsequent to his retirement.

Plaintiffs Harvey Karlen, Arnold Kuhn and Loretta Carsello were employed by City Colleges as professors as of January 1, 1983. At that time, Kuhn was 66, Carsello was 65, and Karlen was 64 years old. They bring this case as a class action on behalf of all faculty members eligible for early retirement,[1] alleging that the program violates 29 U.S.C. §623(a) and (g) of the age Discrimination in Employment Act (the "Act") by discriminating against faculty members who seek early retirement after age 65. Plaintiffs argue that the denial of group insurance coverage payments and the sharp drop-off in lump sum sick leave termination benefits to those who choose to retire after age 65 is age-based discrimination with respect to "compensation, terms conditions, and privileges" of empolyment and a violation of §623(a)(2).

Defendants respond that the program's age group distinctions are permissible under the "exception" in §623(f)(2) of the Act, which states that it shall not be unlawful for an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ." Plaintiffs contend that the program is not part of a bona fide retirement plan and is a subterfuge for the defendants' discriminatory purpose of replacing older faculty with younger teachers who receive lower salaries.

We previously denied the defendants' motion to dismiss, holding that not enough information was in the record at that time to enable us to determine whether the plan was a subterfuge to evade the Act's purposes. *Karlen* v. *City*

Colleges of Chicago, Memorandum Op. at 3-4 (N.D. Ill. Nov. 14, 1984) (Grady, J.). Both sides have since filed extensive memoranda and factual meterial in support of cross-motions for summary judgment and we are now able to assess the validity of the program.

DISCUSSION

In order for defendants to establish a defense under §623(f)(2), they must establish the existence of three elements: (1) they must have been observing the terms (2) of a bona fide retirement plan (3) which is not a subterfuge to evade the purposes of the Act. *E.E.O.C.* v. *Fox Point-Bayside School District,* 772 F.2d 1294, 1299 (7th Cir. 1985). Because the Act is remedial in nature, courts interpret the §623(f)(2) exception narrowly. *Sexton* v. *Beatrice Foods Co.,* 630 F.2d 478, 486 (7th Cir. 1980). The employer has the burden of proving the defense. *Monroe* v. *United Air Lines, Inc.,* 736 F.2d 394, 408 (7th Cir. 1984). It is undisputed that the early retirement program in this case has been "observed," or carried out, by the defendants. Defendant Board's Motion for Summary Judgment, 2. Accordingly, we analyze only the last two prongs of the defense, beginning with the program's status as a bona fide retirement plan.[2]

Bona Fide Retirement Plan

Plaintiffs contend that the early retirement program is not sufficiently integrated into a bona fide retirement plan and is in reality a "fringe benefit" term of employment under §623(a)(2), citing, among other cases, *Alford* v. *City of Lubbock,* 664 F.2d 1263 (5th Cir. 1982); *E.E.O.C.* v. *Westinghouse Elec. Corp.,* 725 F.2d 211 (3d Cir. 1983); *E.E.O.C.* v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984). Defendants respond that the program is a local contractual

supplement to the statutory retirement provisions in the State Universities Retirement System (SURS), Ill. Rev. Stat. ch. 108½ ¶¶15-101 *et seq.* (1985), that the program is consistent with the primary purpose of the Act to promote the employment of older persons, and that the program is thus within the §623(f)(2) exception under *E.E.O.C.* v. *Fox Point-Bayside* and *Patterson* v. *Independent School District #709,* 742 F.2d 465 (8th Cir. 1984).

We agree with the defendants that the early retirement program must be considered a part of the overall retirement benefit system. A valid relevant statute is incorporated into a collective bargaining agreement as a matter of course. *Board of Education* v. *Chicago Teachers Union,* 88 Ill. 2d 63, 74, 430 N.E.2d 1111, 1116 (1981). Further, the program expressly allows its participants to take part in the statutory "early retirement without discount" program in Ill. Rev. Stat. ch. 108½, ¶15-136.2. Defendant Board's Motion, 13 (reference to "House Bill 289" in Paragraph G of the program refers to that statute). Paragraph 15-136.2 requires the Board to contribute a percentage of the teacher's annual salary to the SURS if the teacher takes early retirement before age 60. Paragraph 15-113.4 of the SURS statute also grants additional pension credit to teachers for accumulated sick leave time for which they are not paid at the time of retirement. Because the contractual program must function concurrently with the provisions of SURS, common sense dictates that the program be considered part of the overall retirement package available to the faculty.

Case law supports this finding. In *Fox Point,* the Seventh Circuit held that a similar retirement program for teachers was protected from allegations of age-based discrimination by §623(f)(2). As do the plaintiffs in this case, the E.E.O.C. in *Fox Point,* argued that the early retirement program in the collective bargaining agreement was not part

of the state retirement plan in any meaningful sense. The court stated:

> Obviously a collective bargaining agreement cannot incorporate itself into (or amend) a statute. But one can supplement a statutory retirement scheme, both by determining who pays required contributions and by covering subjects not covered in the statutory framework. If so, then the retirement plan under which the teachers are employed is made up of both the statutorily and contractually based provisions. . . .

772 F.2d at 1301. As in *Fox Point,* the program in this case operates as another aspect of the overall system of benefits available to the prospective retiree. The Court in *Patterson* states the matter even more clearly, holding that "an *early* retirement plan is certainly a '*retirement* . . . plan,' which if bona fide is exempted by §623(f)(2)." 742 F.2d at 468.

The plaintiffs' argument that the program is actually only a fringe benefit centers around the lump sum sick leave payments. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, 18-19. In *Alford,* the court held that a city's denial of accrued sick leave pay to workers too old to qualify for the city pension plan was the "administration of a simple fringe benefit" and not within §623(f)(2). Yet in *Alford,* the refusal to pay sick leave was, by the city's own admission, a wholly separate policy that was not included in the city's pension and retirement plan. 664 F.2d at 1271 n.9. Because it had no connection to the retirement plan, the sick leave policy was a term of employment that was "functionally irrelevant" to the retirement plan protected by §623(f)(2). *Id.* at 1272. In contrast, the declining percentage of sick leave termination benefits in the Board's program is an integral part of the program and the incentive system on which it operates. *See Patterson,* at 467-68 (incentive of an early retirement payment of $10,000 if

retirement occurs at age 55, with the payment reduced by $500 for each year that the employee waits to take early retirement after 55 and reduced by $1,500 for each year after age 60 up until age 65, when payments cease to be made).

Westinghouse and *Borden's* are also clearly inapposite to the instant case. In both cases, the employer closed a plant and workers who were eligible for early retirement were denied severance and layoff benefits that were given to younger workers. Neither practice was related in any way to a retirement program; both used the eligibility of older workers for retirement as a criterion to deny severance benefits in a discriminatory fashion, forcing the older workers to retire and reserve whatever jobs might reopen for younger workers.

The lump sum payments in this case are correctly classified as a "wage substitute" rather than a fringe benefit. The Board, in essence, gives its faculty the option of continuing to work or foregoing that entitlement. Those who give up years that they might have worked are compensated by means of the lump sum payments. This is entirely different from the schemes in *Westinghouse* and *Borden's,* in which "no relationship exist[ed] between the value of the job given up and the value of the benefits." *Britt* v. *E.I. DuPont de Nemours & Co.,* 768 F.2d 593, 595 (4th Cir. 1985).

We find that the early retirement program at issue is one part of a bona fide retirement plan and thus may qualify for protection from allegations of age-based discrimination under §623(f)(2).

Subterfuge

The question of subterfuge, although one of intent, may be decided on summary judgment as the court is "not

required to evaluate every *conceivable* inference which can be drawn from evidentiary matters, but only reasonable ones." *Parker* v. *Federal National Mortgage Ass'n,* 741 F.2d 975, 980 (7th Cir. 1984); *Holly* v. *City of Naperville,* 603 F.Supp. 220, 229 (N.D. Ill. 1985) (Grady, J.). For the reasons indicated below, we believe that the only reasonable inference to be drawn from the evidentiary matter before us is that the defendants' early retirement plan was not intended as a subterfuge to evade the purposes of the Act.

In *United Air Lines, Inc.* v. *McMann,* 434 U.S. 192 (1977), the Supreme Court interpreted the "subterfuge" clause of §623(f)(2). In holding that a plan established 26 years prior to enactment of the statute could not be a subterfuge to avoid its purposes, the Court stated:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense. . . . We reject any such *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.

434 U.S. at 203.

McMann does not in itself immunize voluntary early retirement plans from allegations of subterfuge. *Cipriano* v. *Board of Education of the City School District of North Tonawanda,* 785 F.2d 51, 58 (2d Cir. 1986). A "voluntary" plan that provides such disincentives to those who would otherwise decline retirement that it effectively coerces the retirement decision can be a subterfuge. *Karlen* v. *City Colleges of Chicago,* Memorandum Op. at 3. However, we think that the board has demonstrated legitimate business reasons for the program and has shown that the program

gives faculty members a viable, meaningful option to continue working or to take early retirement.[3]

The regulations promulgated by the E.E.O.C. make it clear that optional early retirement programs may coexist with the purposes of the Act.

> Neither section 4(f)(2) [623(f)(2)] nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

29 C.F.R. §1625.9(f)(1986). However, plaintiffs point to another regulation:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. . . . Where employee benefit plans meet the criteria in section [623(f)(2)], benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred on behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. §860.120(a)(1).

The Second Circuit weighed the language of these regulations in *Cipriano,* a case in which the defendant school district had obtained a summary judgment in district court that its voluntary early retirement plan was protected by §623(f)(2). On appeal, the court ruled in an opinion by Judge Friendly that the record was not substantial enough to

support the district court's conclusion of lack of subterfuge because the defendants had submitted no factual evidence. The court declined to define exactly the defendant's burden, but stated:

> While we would not wish to be understood as endorsing every detail of the regulations, we cannot simply disregard them. All that we now decide is that even in the case of voluntary early retirement plans the employer—and also here the union—must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did.
>
> . . . .
>
> We would not wish our decision here to be read as a disapproval of voluntary early retirement plans in general or of this one in particular. The evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan.

785 F.2d at 58-59.

In this case, the defendants have come forward with ample cost justifications for the program. It is uncontested that the program was designed to make early retirement more attractive in order to save costs. A greater lump sum sick leave benefit is granted to younger retirees for an obvious reason; the cost savings by the Board in not paying salary for 15 years for ages 55-70 ($818,074) is far greater than the savings in avoiding payment of salary for the five years between ages 65 and 70 ($193,256). Appendix to Defendant Board's Motion for Summary Judgment, Exhibit 5. The Board has to offer a larger incentive to younger retirees because they must give up more in potential salary.

The total savings to the Board is a function not only of the savings in unpaid salary minus the cost of paying the early retirement benefits; the cost of the teacher's replacement, if any, must also be taken out of the total savings realized by a teacher's election of early retirement. Prior to the implementation of the program, the Board was facing the problem of declining enrollment and the need to lay off tenured faculty members. Defendant Board's Statement of Uncontested Facts, ¶¶4-9. The Board considered four scenarios in which the early retiree was replaced by (1) an outside lecturer; (2) a teacher currently in the system lecturing overtime; (3) a newly hired lecturer; or (4) was not replaced. Under all four scenarios, the Board realizes a savings of at least $469,584 when a teacher elects early retirement under the program at age 55; $223,452 in savings when a teacher retires at age 60; and $87,699 when a teacher retires at age 65. Appendix to Defendant's Motion, Exhibit 5.

Courts have approved the use of a "sliding scale" of incentive payments in the context of voluntary early retirement plans, with younger retirees obtaining a large payment and benefits diminishing with age. *Patterson,* 742 F.2d at 468; *Karlen* v. *City Colleges,* Memorandum Op. at 3-4. However, plaintiffs maintain that the scaling down of sick pay is so abrupt at age 65 (from 80% to 45% of sick pay accrued) that, combined with the loss of insurance benefits at that age, the program cannot be explained "other than the fact that the defendants wanted to put as much pressure as they could on those at age 65 to retire." Plaintiffs' Reply Memorandum, 7-8.

We do not think that the Board must defend a voluntary retirement plan' sliding scale of benefits against a charge of subterfuge by showing geometrical precision in that scale. Faculty members eligible for the program were given a choice between two viable alternatives; one could take the

early retirement benefits or one could make far more money by continuing to work until age 70. It is true that the worker who retires at age 60 obtains more in the way of termination benefits than the worker who retires at 65. The Board continues to pay his group insurance premiums, and he is awarded 80% of his accrued sick leave rather than 45%. Yet this is the linchpin of the program's effectiveness—unless the benefits of early retirement decline at a faster rate over time than the benefits of remaining on board, there is really no monetary incentive to retire early.

The plaintiffs argue that the program must be defended on the basis that the cost of providing the benefits to older workers is greater, not on the basis that the employer saves more money by inducing younger workers to retire early. They assert that the defendants must show that the cost of the benefit bears a relation to the age of the employee in order to justify the program. The defendants have done so. It is obvious that paying "accumulated sick leave" to older workers costs more than paying it to younger workers because they have had more time to accumulate sick leave. We think that pattern of sick leave benefits adequately reflects the cost to the Board of paying the lump sum. Even though the percentage *rises* from age 55 to age 60, that reflects the fact that the Board must pick up additional costs for retirees under age 60 under paragraph 15-136.2 of SURS, *supra* p. 5. The drop from 80% to 45% reflects that the older worker has accumulated more sick leave; it costs almost as much to pay age 70 retirees their 45% lump sum as it does to pay age 64 retires their 80%. Appendix to Board's Motion, Exhibit C and Affidavit of Robert J. Lill, ¶6.

The costs of insurance benefits for older workers rise significantly with age. Appendix to Defendant's Motion, Exhibits 11 and 12 (Letter to City Colleges' Controller from

Crown Life Insurance Company, stating increasing rates for older workers; Board's chart of insurance costs). The cost of insurance under the group policy increases from $2.57 per $1,000 of benefit to $2.77 at age 65 and increases to $3.89 at age 69. *Id.*

Plaintiffs have submitted evidence that Board employees, in designing the early retirement plan, stated that the introduction of "new blood" was a rationale for the plan. Appendix to Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Exhibits G, H, I, J (memoranda of Hymen Chausow). Yet even in light of this evidence, we still think that summary judgment for the defendants is appropriate. Our inquiry on summary judgment is guided by the Supreme Court's recent decision in *Anderson* v. *Liberty Lobby, Inc.*, ____ U.S. ____, 106 S. Ct. 2505 (1986):

> If the defendant in a run-of-the-mill civil case moves for summary judgment . . . the judge must ask himself not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 2512. Given the extensive justifications offered for the program by the defendants, we do not think that a "fair-minded jury" could reasonably find the program to be a subterfuge based on the "new blood" evidence. The fact that younger teachers would replace retirees is a result of the program, but not the principal reason for its existence. Further, Board officials in at depositions that "new blood" referred not only to younger faculty, but faculty with a wider range of teaching skills, regardless of age. Appendix in

Support of Defendant Board's Motion for Summary Judgment, Deposition of Hymen Chausow at 35-36.

Plaintiffs' argument that defendants' motive was to bring in "new blood" is also answered by the voluntary nature of the plan and the fact that 10 of 17 teachers reaching age 65 between June 30, 1984 and July 1, 1985, did decline early retirement. Defendant Board's Statement of Uncontested Facts ¶32. The cost saving rationale for the program has been adequately presented and documented by the Board. We conclude that the rationale is not a subterfuge for age discrimination.

Alleged Violation of §623(g)(1)

We also reject plaintiffs' contention that the cut-off of insurance benefits to those over 65 violates 29 U.S.C. §623(g)(1). That section states:

> For purposes of this section, any employer must provide that any employee aged 65 through 69 and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group health plan offered for such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

In this case, those over 65 who are cut off by the program are retirees, not employees. This section does not cover the insurance rights of retirees. The plaintiffs assert that the term "employee" must be construed to include retirees, but such an interpretation would prevent an employer from doing what §623(f)(2) permits—to make distinctions in benefits as part of a bona fide retirement plan. Employers may not deny older employees identical group health coverage, but they can deny it to those who have retired pursuant to a bona fide retirement plan.

CONCLUSION

The defendants' motion for summary judgment is granted; the plaintiffs' motion for summary judgment is denied.

DATED: Dec. 11, 1986

ENTER: John F. Grady
United States District Judge

---

[1] We granted leave to plaintiffs Karlen and Kuhn to send notice to those employees affected by the early retirement plan on May 9, 1985. Plaintiff Carsello was the only faculty member to join as a plaintiff subsequent to that notice. Karlen retired in 1984 at age 66; Kuhn retired at age 67 in that same year. Carsello continues to earn full-time salary as an employee of City Colleges. Defendant Board's Statement of Uncontested Facts. ¶¶19-21.

[2] In their motions and memoranda, both plaintiffs and defendants blur the distinction between the separate issues of the existence of a bona fide retirement plan and the existence of subterfuge. In *Cipriano* v. *Board of Education of the City School District of North Tonawanda,* 785 F.2d 51 (2d Cir. 1986), the court enunciated the distinction between these two issues:

> For the purpose of determining whether a plan is a "bona fide employee benefit plan" within the meaning of [623(f)(2)], it is immaterial that a more nicely tailored plan would have provided for a bonus starting at higher than $10,000 and gradually tapering off . . . . The way the plan is structured affects only whether it might be a subterfuge to evade the purposes of the Act, not whether it qualifies generically for the shelter of [623(f)(2)].

Id. at 55. As a result, discussion of the substantive benefits of the early retirement program is reserved for the analysis of subterfuge.

[3] The fact that some teachers (including plaintiff Kuhn) had already reached the age of 65 when the program came into

existence does not support a finding of subterfuge. The *Patterson* court ruled that an intrinsically valid plan "is not vitiated by the fact that by reason of the chronological sequence of events plaintiff could not take advantage of all of its ramifications." 742 F.2d at 468.

APPENDIX 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1051

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,

Plaintiffs-Appellants,

v.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT 508 and COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Honorable John F. Grady, Judge Presiding

MOTION OF ILLINOIS ASSOCIATION OF SCHOOL BOARDS, ED-RED, AND ILLINOIS PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION TO PARTICIPATE AS AMICI CURIAE

R. THEODORE CLARK, JR.
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Amici

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1051

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,

Plaintiffs-Appellants,

v.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT 508 and COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division

Honorable John F. Grady, Judge Presiding

MOTION OF ILLINOIS ASSOCIATION OF SCHOOL BOARDS, ED-RED, AND ILLINOIS PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION TO PARTICIPATE AS AMICI CURIAE

The ILLINOIS ASSOCIATION OF SCHOOL BOARDS ("IASB"), ED-RED ("ED-RED"), and the ILLINOIS PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION ("IPELRA"), by their attorneys, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, respectfully request leave to enter this proceeding as Amici Curiae for the purpose of supporting, for the reasons stated therein, the Petition for Rehearing En Banc filed by the Defendant-Appellee Union in this case. The IASB, ED-RED, and IPELRA further request, if the Court grants the Petition for Rehearing En Banc, that they be granted leave

to file a brief amici curiae in support of the position being advance by Defendants-Appellees. In support of this Motion, IASB, ED-RED and IPELRA, respectively, state the following:

1. The IASB is a voluntary non-profit association organized pursuant to Article 23 of the School Code (Ill. Rev. Stat. ch. 123, ¶23-1 *et seq.*) to aid and assist boards of educations in performing their lawful functions and to promote, support and advance the interests of public education. With a membership of over 900 school boards, the IASB's governing body is a Board of Directors composed of members of local school boards whose combined experience gives the IASB a unique depth of understanding of the practical and legal considerations relevant to the operation of school districts, including personnel decisions, and the proper interpretation and application of laws such as the Age Discrimination in Employment Act (ADEA).

2. ED-RED is a consortium of over 100 suburban school districts in the Chicago metropolitan area organized to aid and assist member boards of education in legislative and other matters relating to providing effective educational services.

3. IPELRA is a professional not-for-profit Illinois Association comprised of more than 330 public sector management representatives responsible for formulating and/or executing the labor relations programs for their respective jurisdictions, impacting on more than 200,000 Illinois public employees. IPELRA's members come from virtually all areas of the State of Illinois; they work for school districts, state university systems, municipal, county and state government, as well as special purpose districts.

4. Literally dozens and dozens of school districts, community colleges, and other public employers in the State of Illinois have early retirement programs (most of which are the product of collective bargaining) which provide greater benefits for employees who voluntarily opt to retire at or before a stated age (typically between 60 and 65) than are available to employees who voluntarily opt to retire at an age older than the cutoff age for the early retirement benefits. If the panel's decision in the instant case is not vacated, it will have a direct impact on the legality of such early retirement plans.

5. Because of the tremendous and far-reaching importance of the issue presented in the instant case, it would be helpful for the Seventh Circuit to consider the views and legal arguments of the Illinois Association of School Boards, ED-RED, and the Illinois Public Employer Labor Relations Association.

WHEREFORE, the Illinois Association of School Board, ED-RED, and the Illinois Public Employer Labor Relations Association respectfully request leave to enter this case as amici curiae in support of the Petition for Rehearing En Banc and, if the petition is granted, leave to file a brief amici curiae in support of the position being taken by Defendants-Appellees.

Respectfully submitted,

ILLINOIS ASSOCIATION OF SCHOOL BOARD, ED-RED, and ILLINOIS PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

By R. Theodore Clark, Jr.
R. Theodore Clark, Jr.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

STATE OF ILLINOIS }
COUNTY OF COOK } SS:

AFFIDAVIT OF SERVICE

R. THEODORE CLARK, JR., being first duly sworn on oath, deposes and states that he served the foregoing Motion of the Illinois Association of School Boards, ED-RED, and the Illinois Public Employer Labor Relations Association to Participate as Amici Curiae by mailing two copies thereof to the following named parties of record on the 14th day of March, 1988, postage prepaid:

Stephen G. Seliger, Esq.
Stephen G. Seliger, Ltd.
180 North LaSalle Street—Suite 1101
Chicago, Illinois 60601

Robert H. Eygenhysen, Esq.
City Colleges of Chicago
226 West Jackson Boulevard—5th Floor
Chicago, Illinois 60606

Richard E. Girard, Esq.
Three First National Plaza
Suite 1350
Chicago, Illinois 60602

Alfred Miller, Esq.
Steven S. Honigman, Esq.
Peter N. Greenwald, Esq.
Miller, Singer, Raives & Brandes, PC
One Rockefeller Plaza
New York, New York 10020

Gilbert Feldman, Esq.
Cornfield & Feldman
343 South Dearborn
13th Floor
Chicago, Illinois 60604

R. Theodore Clark, Jr.
R. Theodore Clark, Jr.

Subscribed and sworn to before me
this 14th day of March, 1988.

Sharon A. Robinson
Notary Public

"OFFICIAL SEAL"
SHARON A. ROBINSON
Notary Public, State of Illinois
My Commission Expires Feb. 10, 1991

APPENDIX 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1051

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,

Plaintiffs-Appellants,

v.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT 508 and COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Honorable John F. Grady, Judge Presiding

MOTION OF OAKTON COMMUNITY COLLEGE DISTRICT NO. 535 TO PARTICIPATE AS AMICUS CURIAE

FRED B. LIFTON
TAMARA A. TANZILLO
ROBBINS, SCHWARTZ, NICHOLAS, LIFTON & TAYLOR, LTD.
29 South La Salle Street
Suite 860
Chicago, Illinois 60603
(312) 332-7760

Attorneys for Amicus

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1051

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,

Plaintiffs-Appellants,

v.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT 508 and COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Honorable John F. Grady, Judge Presiding

MOTION OF OAKTON COMMUNITY COLLEGE DISTRICT NO. 535 TO PARTICIPATE AS AMICUS CURIAE

MOTION OF OAKTON COMMUNITY COLLEGE DISTRICT NO. 535 TO PARTICIPATE AS AMICUS CURIAE

Oakton Community College District No. 535, by their attorneys, Fred B. Lifton & Tamara A. Tanzillo, Robbins, Schwartz, Nicholas, Lifton & Taylor, Ltd., respectfully request leave to enter this proceeding as amicus curiae for the purpose of supporting, for the reasons stated herein, the Petition for Rehearing En Banc filed by the Defendant-Appellee Union in this case.

We further request, if the court grants the Petition for Rehearing En Banc, that we be granted leave to file a brief

amicus curiae in support of the position being advanced by the Defendants-Appellees.

In support of this Motion, Oakton Community College District No. 535 state as follows:

1. Oakton Community College District No. 535 is a public community college organized pursuant to the Public Community College Act, *Ill. Rev. Stat.* 101-1 et al.

2. Oakton Community College has an early retirement program adopted through the efforts of collective bargaining, which offers increased benefits for employees who voluntarily decide to retire at or before a stated age. Employees who opt to voluntarily retire at an age older than the early retirement cut-off date (typically older than 65) forfeit the early retirement incentives. If the panel's decision in the instant case is not vacated, it will have a direct and drastic impact on the legality of this plan. Other clients represented by this firm have similar provisions in their agreements.

3. In view of this decisions sweeping detrimental effect on Oakton Community College and a considerable number of other school districts and community colleges, it would be beneficial for the Seventh Circuit to consider the views and legal arguments of Oakton Commuinity College District No. 535.

WHEREFORE, Oakton Community College District No. 535 respectfully requests leave to enter this case as amicus curiae in support of the Petition for Rehearing En Banc and, if the petition is granted, leave to file a bried amicus curiae in support of the position being taken by the Defendants-Appellees.

Respectfully submitted,

Robbins, Schwartz, Nicholas,
Lifton & Taylor Ltd.

Robbins, Schwartz, Nicholas,
Lifton & Taylor Ltd.

Of Counsel

FRED B. LIFTON
TAMARA A. TANZILLO
ROBBINS, SCHWARTZ, NICHOLAS,
LIFTON & TAYLOR, LTD.
29 South LaSalle Street
Suite 860
Chicago, Illinois 60603
(312) 332-7760

3218.4-4

SERVICE LIST:

STEPHEN G. SELIGER, Esq.
Stephen G. Seliger, Ltd.
180 North LaSalle Street—Suite 1101
Chicago, Illinois 60601

ROBERT H. EYGENHYSEN, Esq.
City College of Chicago
226 West Jackson Boulevard—5th Floor
Chicago, Illinois 60606

RICHARD E. GIRARD, Esq.
Three First National Plaza
Suite 1350
Chicago, Illinois 60602

ALFRED MILLER, Esq.
STEVEN S. HONIGMAN, Esq.
PETER N. GREENWALD, Esq.
Miller, Singer, Raives & Brandes, PC
One Rockefeller Plaza
New York, New York 10020

R. THEODORE CLARK, JR., Esq.
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street—Suite 4200
Chicago, Illinois 60603

FRED B. LIFTON, Esq.
TAMARA A. TANZILLO, Esq.
Robbins, Schwartz, Nicholas, Lifton & Taylor, Ltd.
29 South LaSalle Street—Suite 860
Chicago, Illinois 60603

Supreme Court, U.S.
FILED
MAY 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term

No. 87-1831

COOK COUNTY COLLEGE TEACHERS UNION LOCAL 1600, AFT, AFL-CIO,
Petitioner,

vs.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT # 508,
Defendant-Respondent,

and

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,
Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SEVENTH CIRCUIT

STEPHEN G. SELIGER
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
(312) 427-4500

Attorney for Plaintiffs-Respondents

Pandick Technologies, Inc., Chicago • (312) 236-0200

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No. 87-1831

In The
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COOK COUNTY COLLEGE TEACHERS UNION LOCAL 1600, AFT, AFL-CIO,

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CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT # 508,

Defendant-Respondent,

and

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,

Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SEVENTH CIRCUIT

Respondents, Harvey Karlen, Arnold Kuhn and Loretta Carsello, plaintiffs below, file this brief in opposition to the petition for writ of certiorari of Cook County College Teachers Union Local 1600, AFT, AFL-CIO.[1]

[1] City Colleges of Chicago, another defendant in this case, has chosen not to seek review of the Seventh Circuit opinion in this Court.

PRELIMINARY STATEMENT

The petitioner, Cook County College Teachers Union, Local 1600, AFT, AFL-CIO, seeks review of two issues in its petition for certiorari: (1) whether an early retirement program available to employees over 55 years old which cuts off benefits at age 65 is subject to § 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), and, if so, (2) whether an employer satisfies a defense under § 4(f)(2) of the ADEA by claiming only that the purpose of the Early Retirement Program is to save money by encouraging retirement of older employees earning high salaries.

Plaintiffs claimed in this lawsuit that the Early Retirement Program of City Colleges of Chicago (City Colleges) discriminated on its face against faculty members over 65 years old in two ways. First, for all those who retired between the ages of 55 and 65, City Colleges agreed to pay the premiums for health, life, dental, vision, homeowners and automobile insurance. To those above age 65, all paid insurance benefits were eliminated.

Second, City Colleges agreed to pay a lump sum distribution to those employees over 55 who took early retirement. That lump sum payment was based on a percentage of sick time accumulated by the employee up to the date of retirement. The percentage rate used to determine the amount of the lump sum payment abruptly declined at age 65. For an employee between ages 55 and 58, City Colleges paid 50% of the employee's accumulated sick time. At age 59, the percentage increased to 60%. Between ages 60 and 65, the percentage increased to 80%. At age 65, however, the percentage dropped to 45% and remained at that level through age 70. The 45% paid to those over age 65 was the same as that paid to employees who were forcibly retired at age 70 (under then-existing law).

Section § 4(a)(1) of the ADEA makes it illegal for an employer to "discriminate against any individual with

respect to his compensation, terms, conditions or privileges of employment because of such individual's age." The District Court and the Court of Appeals both found that the Early Retirement Program (ERP) on its face discriminated against those over age 65 by eliminating insurance benefits and drastically reducing the lump sum payment to those over 65 years old.

Once a *prima facie* case under § 4(a)(1) is made, an employer may defend by claiming that the program is a *bona fide* retirement plan under § 4(f)(2) of the ADEA. This section allows age-based distinctions in "any *bona fide* employee benefit plan such as a retirement, pension, or, insurance plan, which is not a subterfuge to evade the purposes of this chapter." Defendants asserted this defense.

After analyzing the factual record, the District Court found that there was no material issue of fact on the subterfuge defense and entered judgment for the defendants. The Court of Appeals reversed, holding that the plaintiffs presented sufficient facts on the § 4(f)(2) subterfuge issue to merit a jury trial.

For two reasons, the Court should deny the petition.

The first reason for denying the petition is that this case is in an interlocutory stage. The Court of Appeals reversed the entry of a summary judgment for the defendants and remanded for trial, holding only that there are sufficient factual issues on the question of subterfuge to merit a trial. It is only in an extraordinary situation that this Court will grant certiorari in a case which has not reached final judgment. It should not do so here.

The second reason for denying the petition is because there is no conflict among the Circuits or within the Seventh Circuit on the law applicable to early retirement programs. Petitioner has misread the cases and the lower court opinion. The law is settled that a voluntary early retirement program, like any other term, condition or privilege of employment, or benefit package, is subject to

scrutiny under § 4(a)(1) of the ADEA. Its voluntariness does not immunize an age-based benefit plan from review under the ADEA.

Neither is there a conflict on the nature of the defense available under § 4(f)(2). The Court below did not hold, as petitioner asserts, that the cost of benefits must be actuarially tied to age. Rather, the Court simply held there were fact issues relating to subterfuge, after it reviewed the entire record and found a number of credibility issues in defendants' assertions about the reasons for the design of its plan. Like the concept of pretext, *see*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a review of the issue of subterfuge involves a broad inquiry into the credibility of the employer's assertions. Based on the particular facts in this record, the Court found that there were a number of factual issues precluding summary judgment. The Court held nothing more. There was no ruling on the § 4(f)(2) defense which conflicts with the decision of any other court.

STATEMENT OF FACTS

Because the petitioner presented no facts in its petition concerning the creation of the ERP, some salient facts on this issue are included here.

In November, 1981, the Illinois Supreme Court ruled that City Colleges' policy of mandatory retirement of faculty members at age 65 violated Illinois law and ordered this practice to cease. *The Board of Trustees of Community College Dist. No. 508 v. Human Rights Commission*, 88 Ill.2d 22 (1981). Four months later, City Colleges, along with the petitioner, began drafting and consideration of the Early Retirement Program (ERP) which is the subject of this suit. Plaintiffs claimed that the ERP, by abruptly cutting off benefits at age 65, continued by other means the discriminatory treatment of faculty members over 65 years old which the Illinois Supreme Court had ruled ille-

gal. Hill Dep. 15-20, 62, 68; Exh. A.

In seeking approval of the ERP from the City College Board of Trustees, the Chancellor stated that "[t]he main purpose of the [ERP] . . . is to realize financial savings by replacing older faculty members earning a higher salary with younger faculty members at the lower end of the salary schedule." Supplement to Motion for Summary Judgment, Exh. E. The Chancellor explained that there was a benefit in replacing older with younger faculty because "[y]ou have an infusion of new views, more recent training, perhaps, because you couldn't force oldtimers to go out and get more courses in the more recent courses in their own field." Shabat Dep. 36-37.

In four memos relating to the ERP, the vice-chancellor responsible for drafting it said that one of its benefits was the infusion of "new blood" into the faculty because they bring in the "newer concepts." Supplement, Exh. G-J, L; Chasau Dep. 35-36. Other officials said that the ERP, by allowing for the replacement of higher paid faculty members with newer ones, would result in "improvement in the quality of staff . . . [since] [m]any replacements would have current training and experience more response to changing technology." Exh. K. Another official warned that without an early retirement program "we will find ourselves facing a superannuated faculty at the top of the salary schedule." Exh. F.

The defendants posited two defenses to the ERP in the District Court. First, they prepared a study purporting to show that for each year after age 55 an employee is replaced by a new hire, there would be a cost savings to City Colleges. The study assumed the salary of the replacement would always be lower than the salary of the older employee. Lill Dep. Exh. A. Plaintiffs argued that this purported salary savings to the City Colleges would, at best, support a benefit package which gradually declined with age. Any such savings could not, however, support the

abrupt cut off of all benefits at age 65 in the ERP. In addition, the plaintiffs presented documents of the defendants showing that salary level was not based on age, but seniority. SA 12-14. The highest paid faculty members were not the oldest. Salary and seniority varied widely at each age level. Defendants' records in addition demonstrated that the average salary of the 65-year-old was less than that of the 60-year-old. Defendant's App. Exh. 5.

The defendants' second justification for the ERP was that the cost of providing the benefits themselves increased with age. Defendants asserted that both the cost of insurance and the lump sum payment based on sick leave accumulated rose with age. Plaintiffs demonstrated that neither of these assertions was correct.

The cost of insurance did not increase with age. Evidence established that health insurance costs decreased at age 65 because Medicare was available at that age, Lill Dep. 9-12, 26; Hill Dep. 152-55, and there was no evidence that the cost of homeowners, dental, vision, or automobile insurance increased at any age, let alone at age 65.

The record also established that the amount of sick leave accumulated did not increase with age, but was based on seniority. The employees with the greatest amount of accumulated sick leave were not the oldest, but those with the greatest seniority. SA 12-14.

The District Court did not agree with plaintiffs' arguments or consider their evidence, and entered summary judgment in favor of the defendants.

The Court for Appeals reversed, holding that there was a jury question whether the ERP was a subterfuge to evade the purposes of the ADEA. The Court pointed out, *inter alia*, that the record contradicted the defendants' assertions that the older workers were at the top of the salary schedule, that the accumulation of sick leave depended on age, as opposed to seniority, or that insurance costs rose with age. The Court also concluded that defendants' age-related cost

considerations and savings did not justify the sharp drop in benefits at age 65. In addition, the Court considered relevant the comments made by City Colleges and Union officials regarding "new blood," "oldtimers," the benefits of younger employees and defendant's past troubles with the Illinois Supreme Court as further evidence of subterfuge. The Court remanded the case for trial, holding that there remained fact issues with regard to subterfuge.

REASONS FOR DENYING THE PETITION

1. The Petition Seeks Review of an Interlocutory Order.

This Court has stated that certiorari should not be granted until a final judgment is entered unless it is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & R., Co.*, 148 U.S. 372, 384 (1893);*Firemen v. Bangor & Aroonstock R. Co.*, 389 U.S. 327, 328 (1967).

The Court of Appeals has not determined the case on the merits, but has only reversed a summary judgment for the defendants and remanded the case for trial. The Court stated that it "hold[s] only that the evidence submitted by the defendants in support of their motion for summary judgment does not establish that a reasonable jury could not find" that the ERP violated the ADEA. A-11-12. Given the number of factual issues involved in this case and the fact that the material reviewed thus far has been adduced only through discovery, the parties and the lower courts should be given the opportunity to have these facts and issues developed at trial. Petitioner may win this case, thereby rendering as moot the issues it raises in its petition.

There will be no extraordinary inconvenience, embarrassment or dire consequences to the petitioner if this Court allows a trial to proceed and a final judgment to be

entered before reviewing this case. At this interlocutory stage, the petition for certiorari is not ripe for review.

2. There is No Conflict Among the Circuits on the Treatment of Early Retirement Benefits.

Section 4(a)(1) flatly prohibits discrimination based on age with respect to any "compensation, terms, conditions or privileges of employment." This provision has been applied to a wide variety of benefits to employees, including retirement and pension benefits. This Court has interpreted 4(a)(1) to "broadly prohibit[ ] arbitrary age discrimination in the work place based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985). The fact that a benefit such as an early retirement program is purely voluntary with the employee does not remove its coverage from § 4(a)(1).

In *Arizona Governing Committee for Tax Deferred Annuity & Deferred Plans v. Norris*, 463 U.S. 1073 (1983), this Court found a voluntary pension and profit sharing plan to be covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The fact that particicpation was voluntary was irrelevant since, according to the Court, Title VII forbids all discrimination concerning compensation, terms, conditions, or privileges of employment, "not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." *Id.* at 1081-82, n.10. The Court held that "retirement benefits constitute a form of 'compensation'" under 42 U.S.C. § 2000e-a(a)(1) which, like its counterpart in the ADEA, § 4(a)(1), prohibits discrimination with respect to "compensation, terms, conditions or privileges of employment."

This Court similarly held in *Hishon v. King & Spalding*, 104 S.Ct. 2229 (1984), that retirement benefits were a term, condition and privilege of employment. This concept of voluntary benefits was directly applied to the ADEA by

this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), in which the Court, quoting from *Hishon*, stated that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all."

The Seventh Circuit adopted this analysis below, holding that it is illegal for the defendants to have an early retirement program which cuts off benefits at age 65. The Court concluded that the ERP is discriminatory because it provides for two benefit levels, "a munificent one for workers 55 to 64 and a chintzy one for workers 65 to 69." A-11. The Seventh Circuit earlier in *Henn v. National Geographic*, 819 F. 2d 824, 827 (7th Cir. 1987), held that "[an] employee excluded from [an] . . . early retirement plan . . . or treated adversely under it . . . has stated a claim of discrimination."

Each Circuit that has considered early retirement or severance benefits paid to older employees has held that agebased distinctions made in such benefits are subject to scrutiny under the ADEA. Judge Friendly in *Cipriano v. Board of Education of Cty. School Dist.*, 785 F. 2d 51 (2d Cir. 1986), found a voluntary early retirement program with gradually diminishing benefits with age to be subject to ADEA review.

The petitioner claims that the Eighth Circuit's decision in *Patterson v. Independent School Dist. # 709*, 742 F. 2d 465 (8th Cir. 1984), is in conflict with *Cipriano*. However, the Eighth Circuit did find that an early retirement program was actionable under §4(a)(1) and then reviewed the §4(f)(2) defense. Other early retirement and severance benefits conditioned or limited by age considerations have been reviewed under the ADEA. EEOC v. *Westinghouse Electric Corp.*, 725 F. 2d 211, 224 (3d Cir. 1983), *cert. denied*, 105 S.Ct. 92 (1984); *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Alford v. City of Lubbock*, 644 F.

2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982).

Neither does *Britt v. E.I. DuPont de Nemours & Co., Inc.*, 768 F. 2d 593 (4th Cir. 1985), create a conflict. In Britt, the Court stated that it was not faced with an early retirement program such as in *Patterson*, but recognized that such a benefit program was subject to ADEA review. n. 4 at 595. *Britt's* analysis and holdings in no way allow an employer free rein to create a voluntary early retirement program with benefits discriminatorily tied to age. In *Britt*, all employees, no matter what their age, were offered severance pay, but those who were also eligible for a pension had to agree to defer the receipt of the pension if they wanted the severance pay. The pension- eligible plaintiff, however, wanted both the severance and the right to immediate receipt of his pension. The Court held that the plaintiff did not state a claim of age discrimination because employees old and young were being treated the same–both were offered identically tailored severance benefits. Thus, in *Britt*, there was no discrimination.

There is no conflict among the Circuits that age-based voluntary early retirement benefits may be considered under the ADEA.

3. There Is No Conflict Among The Circuits On The Nature of the Defense Under Section 4(f)(2).

Petitioner tries to create a false conflict among the Circuits by mischaracterizing the opinion of the Seventh Circuit. According to petitioner, the Seventh Circuit held that a § 4(f)(2) defense requires a showing that the business reasons for the retirement incentives are related to cost of the incentive benefits.

This is not what the Court held. The Seventh Circuit held that where the employer asserts cost savings as a business justification for an age-discriminatory incentive program, then the burden shifts to the employer to demonstrate a high correlation between the age of the employee

and the costs to the employer. The Court stated that "where, as in the present case, the employer uses age–not cost, or years of service, or salary– as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost . . . Otherwise, the inference of age discrimination will be strong– certainly strong enough to defeat a motion for summary judgment " . . . ." A-8. Contrary to petitioner's argument, the Seventh Circuit's opinion, as properly stated, is consistent with the Second Circuit's opinion in *Cipriano*.

The Court nowhere stated that an employer must show a direct relationship between the benefits and their costs or lose its ADEA case. The *defendants* raised this issue. They claimed that because older employees had higher salaries than younger employees, City Colleges would save money by inducing the older employees to leave the workforce and replace them with lower-paid younger employees. But this argument is contradicted by the record. Age has nothing to do with level of salary. At any given age, employees' salaries varied widely, as did their seniority and accumulated sick leave. Plaintiffs also demonstrated that the average salary of the 65-year-old was less than that of the 60-year-old, thereby raising serious doubts about the defendants' assertions that older employees were the highest paid.

The Seventh Circuit's decision on the issue of subterfuge was based on a review of the entire record and is not limited to any cost issue. The Court relied on other facts which undermined the defendant's arguments. Among the facts that justified reversal of the summary judgment were the following: that, although the defendants claimed that insurance costs rose with age, there was no evidence presented on the issue, except that health insurance costs actually declined with age; that, even if the employer could show that higher salary was tied to age, there was no justification for the sharp drop in benefits

at age 65; that the record contradicted the argument that the older employees had more accumulated sick leave; and that the defendants, only months after being ordered to cease an illegal program of mandatory retirement, stated that they were designing the ERP to obtain "new blood" and to replace older with younger employees because of the stereotyped generalization that the "oldtimers" lacked motivation and training. These matters created a fact issue on whether defendants created the ERP as a "subterfuge under the purposes of" the ADEA. § 4(f)(2).

The petitioner has mischaracterized the fact-bound Seventh Circuit opinion and is seeking to create issues and conflicts where none exist.

CONCLUSION

Respondent respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

Stephen G. Seliger